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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 307

ROSE H. BENCEL, Administratrix and Administratrix *ad Prosequendum* of the Estate of THOMAS JOSEPH BENCEL, deceased, *et al.*,
Petitioners,

vs.

WILLIAM FROST and MRS. MICHAEL J. SIMSON, Administratrix and Legal Representative of the Estate of CAPTAIN MICHAEL J. SIMSON, deceased,
Respondents.

IN THE MATTER OF THE PETITION

of

MRS. MICHAEL J. SIMSON, Administratrix and Legal Representative of the Estate of CAPTAIN MICHAEL J. SIMSON, Deceased, Owner of the Motor Boat "ONE MORE", for Exoneration from or Limitation of Liability,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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WILLIAM FROST and Mrs. MICHAEL J. SIMSON, Administratrix and Legal Representative of the Estate of Captain Michael J. Simson, deceased,

Respondents.

IN THE MATTER OF THE PETITION

of

Mrs. MICHAEL J. SIMSON, Administratix and Legal Representative of the Estate of Captain Michael J. Simson, Deceased, Owner of the Motor Boat "ONE MORE" for Exoneration from or Limitation of Liability,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Rose H. Bencel, Margaret Ann Batson, Stella Bencel, Mary Husti Vegh, and Julia Monti, Administratrices, pray that a writ of certiorari issue to review

the judgment of the United States Court of Appeals for the Third Circuit in the above-entitled consolidated matters.

The Opinions of the Courts Below

The opinion of Judge Thomas F. Meaney, dismissing the libel and granting the petition for exoneration is printed in the Appellants' Appendix in the Court below, and is unreported. It is also printed as Appendix A hereto.

The opinion of the Court of Appeals for the Third Circuit, printed as Appendix B hereto, is not yet reported.

Jurisdiction

The decision and judgment of the Court of Appeals for the Third Circuit, sought to be reviewed, printed as Appendix C hereto, was decided and entered on March 31, 1965.

The jurisdiction of this Court is found in 28 U. S. Code, Sections 1254(1) and 2101(c).

Questions Presented

1. Whether or not, where there was undisputed proof that a pleasure fishing cruiser was lost at sea with all hands as a result of a disaster on board which would not occur in the ordinary course of events, an inference of negligence arises and where there was no explanation concerning the manner in which the accident happened which would exculpate the master of the vessel, an admiralty judge must find in favor of the representatives of guests who were on board the vessel to engage in fishing?

2. Whether the Court of Appeals in affirming the judgment of the District Court below erroneously differed with the traditional view of the Admiralty Law with respect to the application of the doctrine of *res ipsa loquitur*, as set

forth in the case of *Leathem Smith-Putnam Navigation Co.* v. *Osby,* 79 F. 2d 280 (7 Cir. 1935), cert. den. 296 U. S. 653, 56 S. Ct. 370, 80 L. Ed. 465 (1935), and *The Rambler,* 290 F. 791 (2 Cir. 1923).

3. Whether members of a fishing party—a traditional maritime activity—are entitled to the warranty of seaworthiness, an important question in maritime law not yet decided in this Court.

Statutes Involved

"46 U. S. C. A. Sec. 183(a). The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Statement of the Case

The appeal below was from a decision of a judge, sitting in admiralty without a jury (63a). The trial court found that "there has been no evidence to explain the nature and cause of the fire which destroyed the 'One More' " and the respondent was not liable (61a). Three widows of three guests and the mother of another guest aboard the "One More" had filed a Libel and Complaint (11a). The respondent, Mrs. Michael J. Simson filed an Answer and also filed a Petition for Limitation of Liability (22a; 29a).

Claims for the three widows, the mother, and the widow of another guest of the "ONE MORE" were filed in the limitation proceeding (46a; 47a; 49a; 50a; 51a). At a pretrial conference, the action against William Frost was dismissed on consent (54a).

The Court heard all issues in a consolidated action (54a).

On July 19, 1961 the decedent, Captain Michael J. Simson, was the owner of the motorboat "ONE MORE", a 26' 7" wooden hull, enclosed cruiser, Chris Craft, built in 1951 and propelled by twin 95 h.p. inboard gasoline engines. It was fitted with a small cabin, raised wheel stand and after cockpit (87a; 127a; 128a; 175a; Exh. L-3) (294a). The boat was purchased by Captain Simson in 1958. In the fall of 1960 the boat was moved to Hoffman's Anchorage in Brielle, N. J., where it was then kept (248a). The boat was used by Captain Simson as a pleasure craft and for sport fishing (295a). Prior to July 19, 1961, Captain Simson invited the deceased, Joseph Arthur Bencel, Lewis George Batson, Thomas John Bencel, Michael Joseph Husti and George Monti, to accompany him on a tuna fishing trip out of Brielle to deep waters in the Atlantic Ocean some 20 miles off shore (114a; 120a; 205a; 206a; 222a; 223a). The decedents were business acquaintances of Captain Simson, who owned and operated a floor covering business in Denville, N. J. The six men arrived at Hoffman's Anchorage in Brielle during the evening of July 18, 1961 and remained at the anchorage overnight (206a). During the evening of July 18th certain arrangements were made by Captain Simson with Raymond Caire, owner of the "FIN FUN", a pleasure boat also docked at the Anchorage. It was the intention of both boats to fish for tuna off Barnegat Light in a location known as "The Ridge", approximately 20 miles out to sea (205a; 223a). Arrangements were made for hourly radio communication between the two boats (235a; 236a).

On the morning of July 19, 1961 at approximately 5:00 A.M., Captain Simson departed Hoffman's in command of the "ONE MORE" with the five decedents aboard as passengers (227a). The boat was seen leaving by Raymond Caire, who also left on the "FIN FUN" less than 5 or 10 minutes after. Before the boats left Raymond Caire spoke with Captain Simson on the radio and transmission was good (226a). The weather on July 19, 1961 at Brielle and offshore was good, the seas quite calm and visibility in haze was variable from one to five miles (228a).

At about 6:45 A.M., or one hour and forty-five minutes after departure, at a distance of some 15 or 20 miles out on a course of 135° magnetic from Manasquan Inlet, Raymond Caire in his boat "FIN FUN" passed by within one hundred yards of the "ONE MORE" (229a). Caire spoke by radio to the "ONE MORE" (231a; 232a; 237a). This was the last contact anyone had with the "ONE MORE" (233a) although Caire tried unsuccessfully to call Captain Simson hourly for a few hours thereafter (237a; 238a). When the "FIN FUN" passed the "ONE MORE", the "ONE MORE" was traveling at 10 or 12 miles per hour (230a; 231a).

The "ONE MORE" did not return to Hoffman's and upon its failure to return a search was instituted under the supervision of the U. S. Coast Guard, and this commenced on the morning of the 20th. Mr. Hoffman Sr. notified the Coast Guard which sent out a general radio call to all vessels to report if the "ONE MORE", or a boat fitting its description, had been seen. Planes were also sent out and from July 20th until July 30th, 1961 the Coast Guard methodically searched the Atlantic Ocean from Block Island to the Maryland-Delaware line. Naval vessels and aircraft in the area also assisted in the search which covered 20,000 square miles per day, and a total of 78,000 square miles were searched in the 10 day period. The search was unsuccessful and terminated July 30, 1961 (171a; 172a).

On August 18, 1961, a piece of wreckage was found 12 miles east northeast bearing 60 degrees true from the Barnegat Light vessel, which was the same general area in which the "ONE MORE" was headed when last seen (170a; 172a). The wreckage was produced in court (Exhibits L-1 and L-2). This wreckage was the remains of the bow section of a Chris Craft cuiser consisting of partial port and starboard gunwales, a very small portion of the stem and stemhead and some small sections of hull planking. The interior of the bow section was badly charred but the exterior was not; the starboard gunwhale was badly charred both inside and outside; the starboard gunwhale was charred on the exterior to within three and one-half feet of the stem, and the interior was extensively charred all the way into the bow section (245a; 246a).

This wreckage was positively identified as coming from the "ONE MORE" by Lt. Cmdr. Walter B. Alvey, a Coast Guard investigating officer and Harold Frost, an employee of Captain Simson who was quite familiar with the "ONE MORE" (173a; 175a; 133a; 135a). The positive identifications were made independently of one another. Lt. Cmdr. Alvey verified the New Jersey motorboat registration of the wreckage from the paint differences under the plastic numerals on the bow which had melted from the fire, and the number coincided with the registration number for Captain Simson's boat, the "ONE MORE". Lt. Cmdr. Alvey was assisted in the identification by information from Mr. Frost concerning tacks put in the bow section by him (173a; 175a). Mr. Frost conclusively identified the wreckage from copper tacks he had installed when he put on new canvas on the bow section a year and one-half before (131a).

No other trace of the "ONE MORE" was ever recovered, nor were Captain Simson and his five passengers ever seen again, nor have their bodies been recovered. The deaths of all six men have previously been adjudicated. *In Re*

Bencel's Estate, 78 N. J. Super. 545, 189 A. 2d 733 (App. Div. 1963). It is evident from the remains of the "ONE MORE" that the boat burned and was destroyed by a fire of great intensity (Exhibits L-1, L-2). The "ONE MORE" was not equipped with a stove or other cooking equipment and no propane was carried aboard the boat (92a; 140a; 337a). The "ONE MORE" was equipped with four fire extinguishers. One was located under the boat's rear seat, another at the steering wheel, one was in the cabin and the fourth was in the cockpit at the bow of the boat (305a; 306a). Going from the bow toward the stern the "ONE MORE" had two bulkheads. The first was about 20 inches from the tip of the bow. This bulkhead formed the rope locker. About 15 feet aft of the first bulkhead was a second bulkhead. The second bulkhead was immediately forward the engines (84a; 139a). Behind the second bulkhead was the engine compartment which was covered over by a wooden hatch which also served as part of the main deck. Both bulkheads were relatively watertight and would be airtight (179a). There was one gas tank which was underneath a seat in the rear of the boat, made of Monel of about 60 gallon capacity (139a; 140a). A single fuel line came off the top of the gas tank (314a). The line then bisected and each branch ran off to the fuel pump of each engine (403a).

Lt. Cmdr. Walter Alvey, investigating officer for the United States Coast Guard, whose duty was to determine the cause of the disaster, and who investigated many marine disasters, testified that from the observation of the charred remains of the "ONE MORE" he found that the fire commenced in or near the engine compartment (180a) and that the probable cause was an explosion prior to the fire (181a). It was his opinion that an explosion immobilized the persons on board to permit the fire to gain headway in order for it to be so extensive (182a). He excluded every

other probable cause. A small fire without explosion of gasoline vapors would have been confined to the engine space. A small fire would have been easy to extinguish by six men with the fire extinguishers on board (199a). It was his further opinion in the absence of any inflammable materials or explosive materials on the boat other than gasoline, that a collection of gasoline vapors was ignited and was the probable cause of the explosion (183a) and there was no other probable cause (199a).

John C. Loeser, a Marine Surveyor, viewed the wreckage (Exhibit "L-1") and testified that the fire originated in the engine compartment, that it was a most intense fire which resulted from ignition and explosion of gasoline vapors (250a; 256a), and that there could not be any other probable cause (252a; 256a).

The source of ignition of gasoline vapors in the engine compartment is present in the form of a spark from the starter when the engines are being started and while the engines are operating from the generator and distributor (257a; 279a).

These 2 experts testified that the sole probable cause of the loss of the "One More" was an extensive fire which was caused by the ignition and explosion of an accumulation of gasoline vapors in the engine compartment. Captain Simson was an experienced boat handler and operator. He had at least ten or twelve years experience in boating with both outboard and inboard boats (299a; 123a). He was familiar with both the construction and the operation of boats. He had built from a kit a 16 foot Chris-Craft type boat which he owned for two years prior to acquiring the "One More" (299a). He was aware of the dangers of gasoline accumulating in the engine compartment on his vessel and of the hazardous situation which exists if fumes are allowed to accumulate (151a; 307a; 347a; 355a). The

ignition range for typical marine gasoline is between about 1½% gasoline in a gas-to-air mixture and about 6% gasoline in a gas-to-air mixture (373a). It is customary, and necessary as a safety precaution, for the operator of a boat, prior to starting the engines to open the hatch to the engine compartment, and to smell and inspect the bilge. This procedure is conducted for the purpose of inspection and ventilation of the engine compartment.

It is customary and necessary as a safety precaution to follow this procedure before commencing a trip and also if the engines have been stopped for any period of time before starting again (151a; 307a; 347a; 355a).

The following statement, which appears in "Piloting, Seamanship and Small Boat Handling" by Charles Chapman, was conceded to be authoritative and generally accurate by respondent's witnesses (329a; 330a; 388a):

> "Probably the first thought that comes to mind is that of safeguarding against fire. Fire is usually traceable to the galley or engine room where faulty installation, improper equipment or carelessness in operation are the direct cause. All of these things are under our control. Gasoline fumes mixed with air form an explosive mixture. These fumes being heavier than air, find their way to the bottom of the bilge. The obvious answer is prevention—make it impossible for gasoline either in liquid or gaseous form to get into the bilge in the first place. Then keep the bilge clean and ventilate the engine compartment thoroughly and there will be nothing that can be ignited. Leakage of liquid gasoline into the bilge can be prevented by proper installation, using strongly-built gasoline tanks, copper tubing for fuel lines, leak-proof connections, tight fittings, and lengths of flexible metallic fuel hose to take care of vibration."

Michael J. Simson was the captain and master of the "ONE MORE" on July 19, 1961 and was the only person on board qualified to operate the boat and he at all times operated and controlled the boat. The engine compartment was an enclosed area of the boat used only in connection with the operation of the boat by the captain and master.

Among other things, the Court specifically found that the vessel "ONE MORE" was used as a pleasure boat and for sport fishing (55a, Par. 1). The sea was calm at the time the vessel departed (56a, Par. 6). The wreckage subsequently recovered was from the "ONE MORE" (57a, Par. 14). All men perished at sea beyond a Marine League (57a, Par. 17). The vessel was destroyed by fire (57a, Par. 18). The Court concluded that since there was no evidence "to explain the nature and cause of the fire" the doctrine of *res ipsa loquitur* does not apply (61a). The Court also held that the petitioners' decedents did not belong to the class of persons entitled to a seaworthy vessel under maritime law (59a). A decree in favor of respondent Mrs. Michael J. Simson was entered (63a).

Reasons for the Allowance of the Writ

1. This case involves a fundamental question in admiralty law dealing with the problem of proof where there was a disaster at sea—a fire and explosion—resulting in the sinking of the vessel with the loss of all persons aboard, including the owner and captain. By their very nature, such disasters rarely leave evidence of their cause, the sea itself usually erasing the evidence. Where there are no survivors, as in this case, there are no eyewitnesses to tell the story of what happened. The issue then is who is to be penalized by the paucity of proof, who has the burden of persuasion, the owner and operator of the vessel or the representatives of the innocent persons who were invited to ride on the vessel by the owner and operator.

The owner of the vessel who was also the operator or captain, and who invited the guests aboard, was in the best position to take the necessary precautions to prevent accidents and must assume the responsibility for any disasters which in the ordinary course of events do not happen in the absence of negligence. The doctrine of *res ipsa loquitur* originated from the recognition that justice required that those in the best position to do so should be held to bear the burden. The owner-operator of the vessel is also in the best position to distribute the loss through insurance. Balancing the equities, the loss should be borne by the owner-operator of the vessel rather than the representatives of the innocent persons who were invited to ride on the vessel.

While the vessel was in the exclusive control of the captain-owner an extraordinary fire and explosion occurred. Under the doctrine of *res ipsa loquitur* an inference of negligence is warranted, which has not been explained or rebutted by the respondent.

This argument substantially accepts the fact findings made by the trial judge sitting in admiralty without a jury. However, petitioners contend that the evidence as a matter of law compels an inference of negligence by the application of the doctrine of *res ipsa loquitur*, or as a matter of burden of proof and circumstantial evidence.

In the case of *Walker* v. *Harris*, 335 F. 2d 185 (5 Cir. 1964) C. J. John R. Brown stated:

> "The District Court held that a 52-year old wooden inland tug which sank at sea in wind and weather which, although rough, she ought to have anticipated, was nonetheless seaworthy. Consequently, the Court granted the vessel owner's right to limit liability, 46 U. S. C. A. §§183-189, and, for double

measure, held the owner free from negligence. This decision encompassed also the ruling that the lifeboat was sufficient, that is, seaworthy, even though none of the essential gear or supplies was tied down or stowed to prevent accidental loss when the lifeboat capsized in the effort to launch it after the manila fall in a boat davit parted apparently from old age. By this appeal the two survivors and the estates of two who did not complete the harrowing 110 hours in the lifeboat, attack these actions. We reverse and remand for computation of damages.

"All counsel in briefs and argument seem preoccupied with a question whether the Judge erred in declining to hold that the tug was unseaworthy (with the privity and knowledge of the owner) because of (a) deficient pumps and (b) the inadequacy of the glass in the sash-type windows in the deckhousing. As we approach the case, all of these things are now unessential since on basic principles, *the evidence as a matter of law compelled the conclusion of negligent unseaworthiness causing the deaths and injuries.* This also greatly simplifies our discussion of the evidence. As a preface we emphasize that *while our result is contrary to that of the District Judge, we reach it without rejecting as clearly erroneous fact findings made below.* * * *" (p. 187) (Italics ours.)

Likewise, the dispute here is with the conclusion of law made by the trial judge from the facts that (61a):

"1. Since there has been no evidence to explain the nature and cause of the fire which destroyed the 'One More' and since there is no evidence warranting more than speculation as to both the nature and

cause of the catastrophe, the doctrine of res ipsa loquitur does not apply."

The undisputed facts disclose that Captain Simson was the owner of the boat and invited 5 of his business acquaintances to accompany him on a tuna fishing trip out of Brielle, N. J. The boat "ONE MORE" with the 5 guests aboard left at about 5 A.M. on July 19, 1961. Before it left Captain Simson was in radio communication with another boat "FIN FUN" and transmission was good. The weather was good, the seas calm and visibility from 1 to 5 miles. One hour and 45 minutes after departure the pilot of the "FIN FUN" spoke by radio to the "ONE MORE" while they were about 100 yards apart. This was the last contact that anyone had with the "ONE MORE", which disappeared. A search was instituted under the supervision of the U. S. Coast Guard. On August 18, 1961 a piece of wreckage was found in the general area in which the "ONE MORE" was headed when last seen. It was the remains of the bow section of a Chris Craft cruiser extensively charred. It was produced in court and marked as an exhibit (L-1 & L-2; 136a). This wreckage was positively identified as part of the "ONE MORE" by the numerals on the bow which had melted from the fire and which coincided with its registration number and from other positive identification by Harold Frost, an employee of Captain Simson who was familiar with the "ONE MORE". No other trace of the "ONE MORE" was ever recovered. Captain Simson and his 5 guests were never seen again nor have their bodies been recovered. The deaths of all six men have previously been adjudicated. *In re Bencel's Estate,* 78 N. J. Super. 549, 189 A. 2d 733 (App. Div. 1963).

It is undisputed that all of the deceased claimants perished at sea beyond a Marine League on July 19, 1961 as a direct result of the loss of the "ONE MORE". It is also

evident from the remains of the "ONE MORE" that the boat burned and was destroyed by a fire of great intensity. It is also undisputed that the vessel was not equipped with a stove or other cooking equipment and no propane gas was carried aboard, and that it was equipped with four fire extinguishers.

There was testimony that when the boat was put back into the water the last of May or first part of June 1961 it was in good condition (107a) after one motor was winterized and the other motor removed and rebuilt (89a). The witness, Harold Hoffman, Jr. testified that he did not see the boat operate and he received no complaints and as far as he knew the engines performed well (90a). He examined the fuel lines which he said was in good condition (110a to 111a) but did not examine the gas tank (111a) which was 6 feet to the rear of the engines (112a).

Another witness, William Frost, an employee of Captain Simson testified that one engine was overhauled because it had reached an age that just required overhauling (142a) that the boat was 9 or 10 years old (143a) and that the last time he had seen the boat was in June 1961 (121a). Other witnesses for respondent testified to the good condition or seaworthiness of the vessel without any examination as a basis for the testimony.

Under cross examination of the respondent's witness the following statement from the book "Piloting Seamanship and Small Boat Handling" by Charles Chapman was conceded to be authoritative and accurate (388a). The quoted portion states (329a):

> "Probably the first thought that comes to mind is that of safeguarding against fire. Fire is usually traceable to the galley or engine room where faulty installation, improper equipment or carelessness in operation are the direct cause. *All of these things*

are under our control. Gasoline fumes mixed with air form an explosive mixture. These fumes being heavier than air, find their way to the bottom of the bilge. *The obvious answer is prevention—make it impossible* for gasoline either in liquid or gaseous form to get into the bilge in the first place. Then keep the bilge clean and ventilate the engine compartment thoroughly and there will be nothing that can be ignited. Leakage of liquid gasoline into the bilge can be prevented by proper installation, using strongly-built gasoline tanks, copper tubing for fuel lines, leak-proof connections, tight fittings, and lengths of flexible metallic fuel hose to take care of vibration." (Italics ours.)

The vessel did not have a drip collector which would prevent gasoline from going into the bilge (331a). It did not have a copper tube from bottom of pan to the intake manifold to suck leakage back into the engine (331a).

Lt. Cmdr. Walter Alvey is an investigating officer for the United States Coast Guard. It was his duty to determine the cause of the disaster. He investigated many marine disasters, and he testified that from the observation of the charred remains of the "ONE MORE" he found that the fire commenced in or near the engine compartment (180a) and that the probable cause was an explosion prior to the fire (181a). It was his opinion that an explosion immobilized the persons on board to permit the fire to gain headway in order for it to be so extensive (182a). He excluded every other probable cause (199a). A small fire without explosion of gasoline vapors would have been confined to the engine space. A small fire would have been easy to extinguish by six men with the fire extinguishers on board (199a). It was his further opinion in the absence of any inflammable materials or explosive materials on

the boat other than gasoline, that a collection of gasoline vapors was ignited and was the probable cause of the explosion (183a).

John C. Loeser, a Marine Surveyor, viewed the wreckage and testified that the fire originated in the engine compartment (250a). He stated that it was a most intense fire which resulted from ignition and explosion of gasoline vapors (250a; 256a), and that there could not be any other probable cause (252a; 256a).

This summary of the essential facts show that while the vessel was in the exclusive control of the captain owner, an unusual event, a fire and explosion occurs. This gives rise to the doctrine of *res ipsa loquitur* and an inference of negligence arises, which has not been explained or rebutted. This satisfies the claimants' burden of proof. *Austerberry* v. *United States,* 169 F. 2d 583 (6 Cir. 1948); *Petition of Bogan,* 103 F. Supp. 755 (D. C. N. J. 1952). Compare *Jesionowski* v. *Boston & M. R.R.,* 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416 (1947); *Blumenthal* v. *United States,* 306 F. 2d 16 (3 Cir. 1962).

2. The Court of Appeals, in affirming the judgment below, erroneously differed with the traditional view of admiralty law with respect to the application of the doctrine of *res ipsa loquitur.*

It is recognized in maritime law that when an unusual event such as an explosion occurs on a vessel in the control of a party charged with negligence, an inference of negligence arises. In *Rose* v. *Stephens & Conduit Trans. Co.,* 11 F. Rep. 438 (D. C. N. Y. 1882), Judge Wallace stated at page 439:

> "* * * As boilers do not usually explode when they are in a safe condition, and are properly managed, the inference that the boiler was not in a safe condition,

or was not properly managed, was justifiable, and the instructions to the jury were correct."

In the case of *The Omar D. Conger,* 1 F. 2d 732 (E. D. Mich. 1924), the Court applied *res ipsa loquitur* in steamer explosion case. See also *The Columbia,* 25 F. 2d 516 (E. D. N. Y. 1927), affd. *per curiam* 25 F. 2d 518 (2 Cir. 1928), cert. den. 277 U. S. 595, 48 S. Ct. 530, 72 L. Ed. 1005 (1928); *Leathem Smith-Putnam Navigation Co.* v. *Osby,* 79 F. 2d 280 (7 Cir. 1935), cert. den. 296 U. S. 653, 56 S. Ct. 370, 80 L. Ed. 465 (1935).

In the case of *The Rambler,* 290 F. 791 (2 Cir. 1923), the facts are stated as follows at page 791:

"Appellant is the owner of the Rambler, a small harbor tug whose boiler blew up without notice or warning, just as she was preparing to take in tow the scow of one of the claimant appellees. The explosion destroyed the Rambler, hurled fragments of vessel and boiler to a great distance, killed the crew on board, and injured property and other persons. From the nature of things there could not be any evidence of what was done or omitted on board the tug immediately before explosion. The reason for disaster remains wholly unknown, so far as any direct evidence of recent acts is concerned * * *."

The Court then said at page 792:

"*The facts upon which liability depends are simple in the extreme.* The Rambler's boiler blew up, although of good, if not superior, make, shortly after satisfactory inspection, and while in charge of duly licensed men. By the contention of the petitioner, no reason is shown for the explosion. *We have no doubt that these facts present a clear case for ap-*

plying the rule commonly spoken of as that of 'res ipsa loquitur'. Of the nature and effect of this rule we have nothing to add to what we said in Central Railroad v. Peluso, 286 Fed. 661. But since this is a case of a boiler explosion on shipboard, we refer to the opinion of Wallace, J., in Rose v. Stephens, etc., Co. (C. C.) 11 Fed. 438. There a jury was instructed that they might infer negligence from the fact of explosion; i.e., the explosion spoke for itself. The reason for this rule and its application is, as Wallace, J., remarked:

> 'Boilers do not usually explode when they are in a safe condition, and are properly managed; therefore the inference that this boiler was not in a safe condition, or was not properly managed, was justifiable.'
>
> "*The court as trier of the facts is like a jury; we may infer negligence from the bald fact of explosion, and we do.* Juries do not ordinarily explain the reasons for their inferences from the testimony; something more is expected from the court; therefore we explain that, since all experience shows that good boilers, well taken care of and managed, do not ordinarily explode, we think that the Rambler's boiler exploded, not because it was a poor boiler, but because it was mismanaged at and shortly before the moment of disaster." (Italics ours.)

The fact that the captain-owner of the vessel died in this disaster does not prevent the application of *res ipsa loquitur*. This was discussed in *Haasman* v. *Pacific Alaska Air Express*, 100 F. Supp. 1 (D. C. Alaska 1951), affd. *per curiam Des Marais* v. *Beckman*, 198 F. 2d 550 (9 Cir. 1952), cert. den. 344 U. S. 922, 73 S. Ct. 388, 97 L. Ed. 710 (1952)

which involved an airplane which disappeared in flight without a trace. Judge Folta stated at page 2:

> "The rule precluding the application of the doctrine where the plaintiff's knowledge is equal to that of the defendant is stated in 65 C. J. S., Negligence, §220(5), page 1000 and 38 Am. Juris. 995, Section 299. An examination of the authorities cited in support of the rule however, discloses that it is applied to cases where the plaintiff has equal knowledge or where knowledge of the cause is equally accessible to the plaintiff—*not to cases in which there is an equality of ignorance as in the instant case.* Since inability, because of a lack of knowledge, to show specific acts of negligence is a prerequisite to the application of the doctrine itself, it follows that equality of knowledge precludes its application. But from this it does not follow that conversely equality of ignorance will likewise preclude applicability, for the function of the doctrine, as stated in the introduction to Shain's Res Ipsa Loquitur, is to supply a fact, i.e. defendant's negligence, which must have existed in the causal chain stretching from the act or omission by the defendant to the injury suffered by the plaintiff, but which the plaintiff because of circumstances surrounding the causal chain, cannot know and cannot prove to have actually existed. I conclude, therefore, that the rule barring the application of the doctrine where there is equality of knowledge is not applicable to the case at bar * * *."

In the case of *Walker* v. *Harris*, 335 F. 2d 185 (5 Cir. 1964) Judge Brown stated:

> "*This analysis brings us, therefore, to the application of the familiar doctrine, so often invoked where vessels sink in calm waters, that sinking (or other fail-*

ure) under circumstances and conditions which the vessel must reasonably anticipate and overcome is the best proof of, and makes out the classic case of unseaworthiness. Although not articulated in such terms, it is a sort of sea-going res ipsa liquitur. Once it is assumed (or judicially held) that the vessel must anticipate the particular hazard and be staunch enough to override it, the only escape from the *inference of unseaworthiness* is proof that some new, unforeseen, intervening force or factor brought about the failure of ship or gear. There is none of that here.

"It is true, of course, that the sudden increase in the northwester put tug and captain in a difficult spot. To head on or turn tail? To maintain or reduce speed? Risk pounding and leakage? Avoid pounding but risk broaching? It is equally true that the mortal blow came from the broaching which we may assume was unavoidable and consequence of the non-negligent decision to slow down: Aggravating these choices and the consequences of decision were the other characteristics of the Tug. This included such things as sash type windows with ordinary window glass panes. And so did the pumps which, although claimed by the shipowner, and found by the Court, to be in good condition, were nevertheless unable to keep up with the intake of sea water. But none of these things or conditions was unknown, unexpected, or unpredictable. Indeed, it was just such things which made the Tug reasonably unfit for these waters in this season. Forces and conditions which she had the duty of anticipating cannot amount to an intervening and new cause to excuse the disastrous result." (193) (Italics ours.)

The Court then held that the evidence as a matter of law compelled the conclusion of negligent unseaworthiness causing the deaths and injuries and proceeded to reverse the trial judge and remanded the case for computation of damages. The Court reached this conclusion without rejecting as clearly erroneous the fact findings made below, finding as matter of law that the unseaworthiness of the vessel was due to the negligence of the shipowner with the privity and knowledge of the owner.

In the case at issue, the Court in its conclusion of law held that the doctrine of *res ipsa loquitur* does not apply as there was no evidence to explain the nature and cause of the fire. If there was clear evidence, then there would be no need to seek the application of *res ipsa loquitur*. The doctrine applies, in the absence of specific evidence, giving rise to an inference of negligence which must be explained or rebutted. A fire and explosion do not ordinarily occur on a vessel in absence of someone's negligence.

There is an inference of negligence in this case, which has not been explained or rebutted. Although specific cause of the disaster is not established, the policy of the law is to place the burden of explanation on the owner and operator of the vessel and to make an inference of negligence in the absence of a satisfactory explanation. The trial court stated that it did not find that there was a satisfactory explanation. The Court erred in holding that the doctrine of *res ipsa loquitur* does not apply. The petitioners should have prevailed as matter of law.

3. The Court of Appeals in affirming the judgment below affirmed the trial court's ruling that the decedents were not entitled to a seaworthy vessel under maritime law. An important question in maritime law not yet decided in this Court, is presented in this case, whether members of a fishing party—a traditional maritime activity—are entitled to the warranty of seaworthiness.

The trial judge did not, in his findings of fact, make any reference to the circumstances under which the deceased had come to be on the vessel except to say that Captain Simson invited "five friends—to accompany him on a tuna fishing trip" (55a). Captain Simson was in the floor covering business (114a). Joseph Bencel, deceased, was a customer of Captain Simson (114a). The deceased, George Monti, Lewis Batson, and Michael Husti all worked for Joseph Bencel (115a). The relationships of the parties were colored by economic interests.

A trial court held that the claim for unseaworthiness does not apply (59a). It is the contention of the petitioners that as a matter of policy and as part of the growing area of application of the doctrine of liability without fault it should have been applied. *Cf. Rothman* v. *U-Steer-It Inc.*, 247 F. 2d 803, 808 (5 Cir. 1957).

The trial court ruled that the decedents were not entitled to a seaworthy vessel under maritime law, citing *Kermarec* v. *Compagnie General Transatlantique*, 358 U. S. 625, 79 S. Ct., 406, 3 L. Ed. 2d 550 (1959) as authority for its ruling (50a). In that case the Court held that a duty to provide a seaworthy vessel was not owed to one aboard a vessel "not to perform ship's work, but simply to visit a friend". However this case did not involve social guests. It involved a fishing party. Fishing is one of the traditional maritime activities.

It was established that the purpose of the trip was to go fishing. The manager of Hoffman's Anchorage testified with reference to Captain Simson (84a-1):

> "A. Well, as I can recall, sir, he usually went out on weekends fairly regularly throughout the summer.
>
> Q. And did he go out for any particular pur-

pose? Was it just boating or fishing? Could you tell us that.

A. To my knowledge, it was just for fishing.

Q. What type of fishing, do you know?

A. Well, sport fishing, such as fishing for bluefish and tuna."

The witness Frost testified to the fact that the parties were going fishing (119a). Mr. Hoffman, Sr., testified (205a-12):

> "A. On the evening of the 18th I was sitting on the lawn and Mr. Simson came up and sat down alongside of me. He said that he had invited some friends to go fishing with him the next day, and they were really going for the big ones, big tuna."

Captain Simson also told this witness that "they were business associates and friends that he had invited down to go fishing with him" (206a-15). The court found as a fact that the party had gone fishing (55a, par. 3).

In a normal commercial fishing venture all those who participate in the operation of the vessel, even in a collateral sense, are entitled to a seaworthy vessel. See *Mitchell* v. *Trawler Racer Inc.*, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2 941 (1960). Since the object of the trip in this case was fishing, even if it was of a sporting nature, the issue of seaworthiness arises. Unless it is deemed mandatory that the decedents have been in the pay or hire of the master of the vessel, they were doing seamen's work when they engaged in fishing operations. In the case of *Murphy* v. *Hutzel*, 27 F. Supp. 473 (E. D. Pa. 1939) the libellant had been a guest on a gasoline launch used for pleasure. At the time the boat was being used for a "crabbing party." In describing the relationship of the parties, Judge Dickinson stated at page 475:

> "The relation of the owner of a boat and those invited to join a junketing trip on her is *often a peculiar one.* The boat must be managed, and otherwise guests, if familiar with the handling of boats, act as members of the crew. Such was the case here, and the libellant was hurt while acting as a member of the crew. The host and guests were common adventurers, much as if two or more together hire a boat. They are both hosts and guests." (Italics ours.)

In the present case the guests were present for the purpose of participating in fishing. The relationship of the parties was a peculiar one which does not fall into the ordinary passenger-carrier relationship or into the usual master-crewman relationship. There was no evidence that the guests were to have anything to do with the operation of the vessel. The court in its findings stated that Captain Simson was "a well qualified and skillful operator of motor boats" (58a, par. 22). The court noted that there was testimony that "one of the guests" had "some knowledge" of the operation of a motor boat (58a, par. 24). The activities of the guests therefore related to the fishing aspect of the trip rather than the operation of the boat itself.

In the case of *Clevenger* v. *Star Fish & Oyster Co.*, 325 F. 2d 397 (5 Cir. 1963) a seaman, while helping to unload fish from a vessel was assaulted by the first mate. The trial judge had found that the "fishing excursion" had been concluded before the attack and that the work of unloading being done at the time was not in furtherance of duties connected with the vessel. This was reversed. Among other things Judge Wisdom stated at page 402:

> "The trial court found in effect that Clevenger was not a seaman, after the vessel reached port; that 'as to the operations of the ship in connection with the

actual fishing operations, as well as the disposal of the fish after they reached the port and there being unloaded. * * * (all) were members of a joint venture.' We think that Clevenger did not lose his status as a seaman. But in any event, he was a seaman's substitute in unloading fish at the time of the attack. In Sieracki the injured libellant was a longshoreman, employed by an independent contractor. In Pope & Talbot v. Hawn 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, a carpenter, employed by an independent contractor to repair grain loading equipment, fell through an uncovered hatch on a ship. The Court, following Sieracki, saw carpentry among the traditional responsibilities of seamen and allowed recovery against the shipowner. Sieracki, Hawn, and Clevenger, while doing a seaman's work, were exposed to the hazards of an unseaworthy ship. The shipowner owed them the absolute duty of furnishing a safe ship.

"There is no evidence that Clevenger was converted from a seaman to a joint venturer on the return of the Star Queen to Mobile, Alabama, except that the officers and crew were paid in shares. *This fact alone does not establish a joint venture.* Osland v. Star Fish & Oyster Co., 5 Cir. 1939, 107 F. 2d 113; 118 F. 2d 772. *And in this case its significance has a bearing only on the question whether there is an employer-employee relationship under the Jones Act. For recovery on the warranty of seaworthiness, it is not significant that conceding Clevenger was a joint venturer, the breach or warranty might be said to have been that of the joint venture. Unseaworthiness may arise from the acts of an injured longshoreman himself employed by an independent contractor.* See Grillea v. United States, 2 Cir. 1956,

232 F. 2d 919; Alaska S.S. Co. v. Peterson. *Here, there is no contention, no suggestion that the owner surrendered control by a demise charter or that the effect of a joint venture is to transfer control and responsibility from the shipowner to the joint venturers.* See Guzman v. Pichirilo, 1962, 369 U. S. 698, 82 S. Ct. 1095, 8 L. Ed. 2d 205. Vitozi v. Balboa Shipping Co., 1 Cir. 1947, 163 F. 2d 286.

"When the action for unseaworthiness is available, its notion of liability swallows up any notion of maritime negligence, no matter how leniently conceived. We see no need, therefore, to discuss negligence." (Italics ours.)

The area of application of liability without fault has expanded tremendously within the last decade. See *Henningson* v. *Bloomfield Motors Inc.*, 32 N. J. 358, 161 A. 2d 69 (1960), 75 A. L. R. 2d 1 (1961); 1 *Frumer & Friedman, Products Liability*, §16.05 (2). The concept has broken out of the narrow confines of contract law based on privity and special relationships and is more broadly based on policy consideration involving human safety and welfare. A similar expansion has been going on in maritime law with reference to the warranty of seaworthiness. *Cf. Gutierrez* v. *Waterman Steamship Corp.*, 373 U. S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297 (1963).

Courts recognize the difficulty of proving fault in many situations. In product liability cases, it is the difficulty in obtaining proof of fault in events in the plants and warehouses of a manufacturer. In maritime cases it is equally difficult to reproduce the conditions under which accidents occur. The ocean, in a very real sense, is a giant eraser forever wiping the slate clean.

Secondly the older concepts, developed with concepts of "privity" are being abandoned. Courts recognize that

strict liability in personal injury and death cases is not rooted in contractual obligations or in economic arrangements but arise from a high regard for human life and safety for all who may be exposed to a given risk of harm.

The courts recognize that it is fairer to place the burden of loss on the one who controls the manufacture of the instrument or the owner in control of the vessel than to leave it with the injured party. These people are in the best position to take the precautions necessary to prevent accidents. They are also in the best position to distribute the loss through insurance.

In *Walker* v. *Harris,* 335 F. 2d 185 (5 Cir. 1964) at page 193, Judge Brown stated:

> "This analysis brings us, therefore, to the application of the familiar doctrine, so often invoked where vessels sink in calm waters, that sinking (or other failure) under circumstances and conditions which the vessel must reasonably anticipate and overcome is the best proof of, and makes out the classic case of, unseaworthiness. * * *"

Under the peculiar status of the deceased on this vessel the court should have held that they were entitled to a seaworthy vessel. They were on board to engage in a maritime activity, *i.e.,* fishing. Their rights should not be made to depend on whether they were paid for participating in the activity. This case is one where the traditional rules establishing unseaworthiness apply. The court erred in failing to permit recovery.

Unless this Writ of Certiorari is granted and this error is corrected, it will result in prejudice to the substantial rights of these petitioners and of other persons whose cases might be decided in a similar fashion contrary to the decisions of this Court and traditional admiralty law.

CONCLUSION

For the above reasons a Writ of Certiorari should be granted as prayed for.

Respectfully submitted,

NATHAN BAKER,
Counsel for Petitioners.

APPENDIX A

Findings of Fact and Conclusions of Law

(Filed—March 6, 1964.)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROSE H. BENCEL, Administratrix and Administratrix ad Prosequendum of the Estate of Thomas Joseph Bencel, deceased, et als,

Libellants,

vs.

WILLIAM FROST and MRS. MICHAEL J. SIMSON, Administratrix and Legal Representative of the Estate of Captain Michael J. Simson, deceased,

Respondents.

CIVIL ACTION No. 1020-61

In the Matter of the Petition of Mrs. Michael J. Simson, Administratrix and Legal Representative of the Estate of Captain Michael J. Simson, Deceased, Owner of the Motor Boat "ONE MORE," for Exoneration from or Limitation of Liability.

CIVIL ACTION No. 91-62

Appearances:

BAKER, GARBER & CHAZEN, For Libellants Claimants,
By: NATHAN BAKER

Appendix A

MEAD, GLEESON, HANSEN & PANTAGES, for Respondent-Petitioner, Mrs. Michael J. Simson,
By: VICTOR C. HANSEN.

MEANEY, District Judge.

The present action was commenced by way of a libel and complaint of Rose H. Bencel, Administratrix and Administratrix ad Prosquendum of the Estate of Thomas Joseph Bencel, deceased; Margaret Ann Batson, Administratrix and Administratrix ad Prosquendum of the Estate of Lewis George Batson, Jr., deceased; Stella Bencel, Administratrix and Administratrix ad Prosquendum of the Estate of Joseph Bencel, deceased; Mary Husti Vegh, Administratrix and Administratrix ad Prosequendum of the Estate of Michael J. Husti, deceased against William Frost and Mrs. Michael J. Simson, Administratrix and Legal Representative of the Estate of Captain Michael J. Simson, deceased, in a cause of action in tort for damages for personal injuries, civil and maritime.

The respondent, Mrs. Michael J. Simson, answered in effect denying the pertinent allegations of damage to the various libelants and claimed limitation of liability to the value of the boat, which, by reason of circumstance, had no value, and asked exoneration.

Both issues were consolidated by order of the court upon application of counsel for the respondent.

At a pretrial conference it was determined that William Frost was not a part owner of the vessel involved in the suit and the action against him was dismissed by consent of both counsel.

Appendix A

Although both actions, the libel and claim for limitation of liability, were initiated by the various parties as administratrices and administratrices ad prosequendum before letters were actually issued, letters were finally issued before trial upon determination by an appellate court of New Jersey that the presumptive death of Joseph Bencel was declared to have occurred on July 19, 1961. Thereafter all parties to the libel and limitation proceedings obtained letters of administration. By stipulation and order of this court the same were filed *nunc pro tunc* as of the date of the institution of the libel and claim for limitation.

Trial was had and testimony was taken and evidence admitted. On said testimony and evidence the following findings of fact and conclusions of law are made:

Findings of Fact

1. Michael J. Simson, the respondent's decedent, was the owner of a 27 foot, wooden hulled enclosed Chris Craft cruiser, built in 1951, powered by twin 95 horsepower inboard gasoline engines. It had a small cabin, raised wheel stand and after cockpit. It was used as a pleasure boat and for sport fishing. It was called the "One More".

2. The boat was purchased by Simson in 1958 and was kept since 1960 at Hoffman's Anchorage in Brielle, N. J.

3. Prior to July 19, 1961 Captain Simson invited five friends, among them the libelant's decedents, to accompany him on a tuna fishing trip to deep waters some twenty miles off shore.

4. During the evening of July 18, 1961 Simson made arrangements with one Raymond Caire, owner of a boat named the "Fin Fun" who was to go to the same fishing

grounds on July 19th, to maintain hourly radio communication between the two boats.

5. On the morning of July 19, 1961, at about 5:00 A.M., Simson departed from Hoffman's Anchorage in charge of his boat, the "One More," with the five decedents aboard as passengers.

6. The weather at Brielle and offshore was good, the sea calm, and visibility varied from one to five miles.

7. Before leaving Hoffman's, Raymond Caire spoke to Captain Simson on the radio, and transmission was good.

8. The "One More" had received clearance from the Coast Guard in June 1961 as to standard required equipment, such as life preservers, fire extinguishers, standard lights and warning devices.

9. The boat "One More" was in good condition as to general seaworthiness.

10. Both engines of the "One More" had been overhauled previous to its last voyage, the port engine in 1960, the starboard in 1961, and according to the overhauler were found to be in operating order, with the engine compartment clean and the hull sound.

11. The "One More" had made several trips with the overhauled engines, prior to its last one.

12. At About 6:45 A.M. on July 19th, at a distance of about 15 or 20 miles off shore, Caire on the "Fin Fun" passed the "One More" within 100 yards of it and had radio communication with the "One More." This was the last contact he had with the "One More" (which was traveling at 10 or 12 knots per hour at the time) although he

tried hourly for a few hours thereafter to establish radio communication with it.

13. The "One More" did not return to Brielle and an intensive search was made for at least ten days, planes and Coast Guard vessels being used and a general radio call sent out to all vessels to watch out for the "One More" or any boat of its description. The search, which covered a total of 78,000 square miles, was fruitless.

14. On August 18, 1961 a piece of wreckage consisting of a charred remnant of the bow section of a Chris Craft boat was discovered in the vicinity of Barnegat Light Ship, and was unmistakably identified as part of the bow section of the "One More."

15. None of the parties who had left on the "One More" on July 19, 1961 was ever seen or heard from since.

16. The deaths of all six men have been adjudicated by the courts of New Jersey (In re Bencel's Estate, 78 N. J. Super. 545).

17. All six men perished at sea beyond a Marine League on July 19th as a result of the loss of the "One More."

18. The mute evidence of the charred remnant of the bow of the "One More" is indicative of the fact that the "One More" was destroyed by fire. There is no other evidence of its loss.

19. On July 19, 1961 there was no stove or other cooking equipment nor any propane gas on the "One More."

20. The "One More' was equipped with four fire extinguishers—one under the boat's rear seat, one in the cabin, one at the steering wheel, and one at the bow of the boat.

21. The "One More" had two bulkheads, one about 20 inches from the tip of the bow, and one about 15 feet aft

immediately forward of the engines, which were housed in a compartment covered by a wooden hatch which served as part of the main deck. There was one gas tank made of monel of about 60 gallons capacity. From this there ran a single fuel line which bisected, a branch running to the fuel pump of each engine.

22. Captain Michael J. Simson was a well qualified and skillful operator of motor boats, his familiarity resulting from ten to twelve years of operation of such boats. He was familiar with the hazards attending the operation of such boats, and the proper precautions to take.

23. There was testimony that one of the guests of Captain Simson had some knowledge of the operation of a motor boat.

24. There is a conflict in the testimony of experts as to the probable nature and location of the initial conflagration and no agreement as to *the* probable cause of it.

25. Several *possible* causes were suggested by the experts from the condition of the charred remnant both as to the nature and origin of the fire.

Discussion

Granted the complete absence of any direct testimony as to the happening of the accident, we must arrive at reasonable inferences to be drawn from that fragment which constitutes the sole remains of the "One More." The libelants' claims seem to be based on unseaworthiness and negligence. The claim of unseaworthiness does not apply to their claims as none of the deceased, for whose estates claims have been made, was a member of the class protected by the martime law of seaworthiness, since they were merely passengers to whom was owed the duty of

reasonable care under the circumstances (*Kermerac* v. *Compagnie Generale Transatlantique*, 358 U. S. 625; Benedict on Admiralty, Vol. 1, p. 260). Further, the testimony seems to indicate seaworthiness.

Thus the right of recovery of the libelants turns upon their claim of negligence, the violation of the duty on the part of the owner and, in this case, operator of the boat. That duty was to exercise reasonable care under the circumstances. To establish their claim, libelants, in the absence of any testimony or other evidence than the charred remnant of the bow of the "One More" rely upon the doctrine of *res ipsa loquitur*. This doctrine is a means by which negligence is inferred rather than explicitly proved. To warrant the drawing of any such inference certain conditions must be met. "The conditions usually stated as necessary for the application of the principle of res ipsa loquitur are three: (1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Prosser on Torts, 2nd Ed. p. 201. Thus *res ipsa loquitur* is usually used to infer negligence after a definite accident has been proved and *circumstances warrant* the inference of negligence.

In the case of the *Petition of Bogan* (103 F. Supp. 755) this court applied the doctrine of *res ipsa loquitur* to a situation involving a shipboard explosion. In that case the fact of an extraordinary explosion had been established, circumstances antecedent thereto had indicated conditions which justified the inference of negligence, and the vessel was in the exclusive control of the master. To such a situation the court felt that the doctrine of *res ipsa loquitur* was apposite, and so applied it.

Appendix A

In the instant case libelants would have the court use inferences both with respect to the accident and the negligence which they alleged caused the accident.

The rationale of most of the cases referring to the application of the *res ipsa loquitur* doctrine would seem to be that more than mere speculation is required, that a more or less compelling and practically exclusive probability must be the basis of the inference of negligence.

The instant case might, with due regard for the determinable facts, be termed unique. There is no evidence of an unseaworthy condition of the boat at the time of its departure, nor evidence of any condition indicative of the existence of suspicious or dangerous elements on board the boat. It disappeared with all on board, leaving no trace execpt the piece of wreckage to which reference has been made. The sole question is: does that single piece of evidence justify the application of the doctrine of *res ipsa loquitur?*

In the *Bogan* case this court was able to determine the precise nature of the accident, and in view of testimony as to the surrounding circumstances could appropriately apply the doctrine of *res ipsa loquitur.*

In the present case, however, all that is known is that there must have been a fire which destroyed the boat. But the record is devoid of facts sufficient to infer the existence of negligence on the part of Captain Simson. True, one may indulge in various speculations and possibilities but "A finding of negligence cannot be predicated upon speculation." (*The Mist-Chief,* 57 F. 2d 875).

Even granting that there was an explosion, this court feels that it cannot say from the testimony that it was caused by the negligence of Captain Simson, or that he

knew or should have known of the existence of what could have caused an explosion.

In view of the above this court makes the following

CONCLUSIONS OF LAW

1. Since there has been no evidence to explain the nature and cause of the fire which destroyed the "One More" and since there is no evidence warranting more than speculation as to both the nature and cause of the catastrophe, the doctrine of *res ipsa loquitur* does not apply.

2. The respondent is not liable in damages to the libelants.

3. In view of these findings, it is not necessary to determine the claim of limitation of liability.

Let an order be submitted.

APPENDIX B

Opinion of the Court

(Filed March 31, 1965)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14973

ROSE H. BENCEL, ADMINISTRATRIX AND ADMINISTRATRIX AD PROSEQUENDUM OF THE ESTATE OF THOMAS JOSEPH BENCEL, DECEASED, ET AL.,

Libellants-Claimants-Appellants,

WILLIAM FROST AND MRS. MICHAEL J. SIMSON, ADMINISTRATRIX AND LEGAL REPRESENTATIVE OF THE ESTATE OF CAPTAIN MICHAEL J. SIMSON, DECEASED,

Respondents-Appellees.

IN THE MATTER OF THE PETITION

OF

MRS. MICHAEL J. SIMSON, ADMINISTRATRIX AND LEGAL REPRESENTATIVE OF THE ESTATE OF CAPTAIN MICHAEL J. SIMSON, DECEASED, OWNER OF THE MOTOR BOAT "ONE MORE", FOR EXONERATION FROM OR LIMITATION OF LIABILITY,

Petitioner-Appellee.

Appendix B

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued March 15, 1965

Before McLAUGHLIN, HASTIE and SMITH, *Circuit Judges*

PER CURIAM.

The opinion of Judge Meaney in the district court completely and properly disposes of the unseaworthy and res ipsa loquitur questions raised on this appeal.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,973

ROSE H. BENCEL, Administratrix and Administratrix ad Prosequendum of the Estate of Thomas Joseph Bencel, deceased; MARGARET ANN BATSON, Administratrix and Administratrix ad Prosequendum of the Estate of Lewis George Batson, Jr., deceased; STELLA BENCEL, Administratrix and Administratrix ad Prosequendum of the Estate of Joseph Bencel, deceased; MARY HUSTI VEGH, Administratrix and Administratrix ad Prosequendum of the Estate of Michael J. Husti, deceased,

Appellants,

vs.

WILLIAM FROST and MRS. MICHAEL J. SIMSON, Administratrix and Legal Representative of the Estate of Captain Michael J. Simson, deceased

(Admiralty 1020-61)

IN THE MATTER OF THE PETITION

of

MRS. MICHAEL J. SIMSON, Administratrix and Legal Representative of the Estate of Captain Michael J. Simson, Deceased, Owner of the Motor Boat "One More" for Exoneration from or Limitation of Liability

Appendix C

(Admiralty 91-62)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, HASTIE and SMITH, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed April 3, 1964, be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 307

ROSE H. BENCEL, Administratrix and Administratrix *ad Prosequendum* of the Estate of THOMAS JOSEPH BENCEL, deceased, *et al.*,
Petitioners,

vs.

WILLIAM FROST and MRS. MICHAEL J. SIMSON, Administratrix and Legal Representative of the Estate of CAPTAIN MICHAEL J. SIMSON, deceased,
Respondents.

IN THE MATTER OF THE PETITION

of

MRS. MICHAEL J. SIMSON, Administratrix and Legal Representative of the Estate of CAPTAIN MICHAEL J. SIMSON, Deceased, Owner of the Motor Boat "ONE MORE", for Exoneration from or Limitation of Liability,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

Petition, page 2, and appendices A and B thereto properly set forth the same.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Does not the mysterious loss of a vessel at sea without a legally adequate explanation as to the cause of the loss by the libellants require a judgment in favor of the respondents?

2. Have not the limits of the doctrine of seaworthiness heretofore been set by this court?

3. Is not one seeking *Certiorari* on a question involving the application of the doctrine of *res ipsa loquitur* in an Admiralty action, where the trial judge sits as both the finder of the fact and trier of the law, essentially raising mixed questions of fact and law and concerning the weight of the evidence, which this court has enunciated in the past as being questions that cannot be properly certified to this court?

4. Does not one seeking *Certiorari* have to demonstrate either a "substantial federal question" or a "conflict of decisions below"?

Statute Involved

The Petition adequately sets forth the statute involved.

Statement of the Case

The appeal below was from a judgment rendered by a judge sitting in Admiralty without a jury (R. 63). The facts leading to this determination follow.

On July 19, 1961, Michael J. Simson, deceased, was the owner of a 26'7" wooden hull enclosed Chris Craft cruiser, built in 1951, and propelled by twin 95 h.p. inboard gaso-

line engines. This boat was fitted with a small cabin, raised wheel stand and after cockpit (R. 87; 127; 128; 175; Exh. L-3). There were two wooden bulkheads, one immediately forward of the engine compartment and another about 15 feet further forward and about 20 inches from the bow (R. 84; 139). Over the engine compartment was a wooden hatch that served as part of the deck (R. 179). To the rear of the engine compartment, at a point under a seat in the rear of the boat, was a 60 gallon Monel gas tank (R. 139; 140). A fuel line came off the top of the gas tank, which then bisected; each section running to the fuel pump of each engine (R. 314; 403).

The boat was purchased in 1958 from one Salvatore Liccardi, the original owner (R. 294). Liccardi had used the boat very rarely during the time he owned it, and this was the reason he sold the boat (R. 297). At the time of sale the boat was in "A-1" condition (R. 297). It was so maintained thereafter (R. 149).

In the fall of 1960 "Captain" Simson had his boat, named the "One More", brought to Hoffman's Anchorage, located in Brielle, New Jersey, for winter storage (R. 88; 104). It was then hauled out of the water by means of a marine railway by Harold Hoffman, Sr., owner of the business, his son, Harold Hoffman, Jr., the Dockmaster, and Edward Mayer, another employee, and then braced and blocked so that the hull rested about 3 feet off the ground (R. 104; 105). The hull was then scrubbed, and found to be sound (R. 105; 106; 211). The starboard engine was thereafter winterized by Harold Hoffman, Jr., who at the time found the interior condition of the boat to be clean and good (R. 106). The port engine was subsequently removed by one Jere Kell, a marine engine mechanic, and was rebuilt (R. 106; 312). He had rebuilt the port engine the year previous (R. 312).

In the spring of 1961 the hull was painted, the rebuilt engine reinstalled and the boat returned to the water in late May or early June to a mooring at Hoffman's Anchorage (R. 92; 107; 213). At that time the hull was in good condition (R. 107; 311). Kell then tested the boat, synchronized the engines and found that both the engines were in operating order, and the hull seemed satisfactory (R. 213; 313). At about the same time, Harold Hoffman, Sr., made an inspection of the boat at Simson's request for the purposes of appraisal (R. 213; 214). He considered the boat to be in better condition than it had been in the fall, because it had been checked and painted (R. 211; 214; 215). The motors and bilges were clean (R. 215). From the time the boat entered the water until its loss, neither he nor his son heard of any complaints regarding the operation of the vessel (R. 90; 215).

The boat was equipped with 10 adult and 3 children's life preservers, a radio, 4 fire extinguishers placed from fore to aft, running lights, 1 horn and 1, or possibly 2, bilge pumps (R. 91; 92; 109; 110; 300; 302; 305; 306). In addition, it had a back flame arrester, bilge ventilators, 2 life rings, a compass and navigational charts (R. 146-148).

After its return to the water, the boat passed the Coast Guard Auxiliary voluntary inspection, and a sticker signifying such was placed on the boat (R. 148).

As to Michael Simson, the owner, he was unquestionably well qualified to operate the boat, having had 10 to 12 years' experience operating both outboard and inboard boats (R. 123; 299). He had, in fact, built a 16′ Chris Craft from a kit, which he operated for two years (R. 299). One individual who had observed Michael Simson operate the "One More" considered his level of proficiency to be slightly less than a professional captain. Another stated that he operated the boat "exceptionally well" (R. 153;

216). They also observed that he followed the standard procedure of opening the engine hatches to ventilate the bilge and engine compartment prior to starting the engines (R. 151; 307; 355).

It is with the knowledge of this background of the boat, its equipment and the experience of its owner, that we turn to the events that led to its loss and the loss of Michael Simson and his five companions.

On July 18th, Michael Simson, who was the owner of a floor covering business in Denville, N. J., invited 5 friends, the petitioners, to go fishing with him from Hoffman's Anchorage, Brielle, New Jersey, early the following morning. It was their intention to fish for tuna (R. 114; 120; 205; 206; 222; 223). The 6 men arrived at the Anchorage from Denville on the evening of the 18th (R. 52; 206). Upon his arrival, Simson happened to meet one Raymond Caire, the owner of the "Fin Fun II", a boat berthed at the Anchorage a short distance from the "One More" (R. 221; 222). The two men discussed what they had heard as to where the tuna were biting, and they decided to go to Barnegat Ridge 16½ miles directly off Barnegat Light the next morning (R. 205; 223). It was also agreed, either at that time or the next morning, that radio communication would be had between the two boats at quarter past each hour (R. 235).

The following morning at about 5:00 A.M., the trip commenced after a successful radio check was had between the two boats (R. 226; 227). The "One More" departed first to be followed within 5 to 10 minutes by the "Fin Fun II" (R. 227).

The weather conditions on the day in question were good. The seas were calm. Visibility varied between 1 and 5 miles because of haze (R. 228).

After a run of approximately an hour and 45 minutes, on a course 135° from Manasquan Inlet, the two boats came abreast at a distsance of between 100 and 300 feet with the "Fin Fun II" to the port side of the "One More" (R. 229; 236). Radio communication was again had between the two boats (R. 231; 232; 237). At this time the "One More" was cruising at what Raymond Caire assumed to be 10 to 12 knots, while the "Fin Fun II" was going almost 15 knots and was thus pulling away from the "One More" (R. 230; 231). This was the last time there was any visual or radio contact between the two boats (R. 233). Futile attempts were made by Caire on two or three other occasions to contact the "One More" by radio (R. 237; 238).

When the "One More" failed to return to Hoffman's Anchorage that evening, apprehension mounted. An extensive Coast Guard search was commenced the following day, utilizing Naval ships and aircraft that happened to be in the area, that continued for 10 days and covered some 78,000 square miles from Block Island to the Maryland-Delaware state line. Private vessels also received a description of the "One More" and participated in the search. The results were fruitless (R. 171; 172).

On August 18, 1961, a burned bow section of a boat was recovered 12 miles northeast of the Barnegat Light vessel (R. 172). This section was turned over to the Coast Guard and was examined by Lt. Cmdr. Walter B. Alvey, who determined that it was the bow piece from the "One More" by means of a comparison of New Jersey motor boat registration numbers and the numbers that remained on the recovered section. Confirmation of the identity of the boat was made by Harold Frost, an employee of Michael Simson, who had worked on the boat on many occasions and who was able to identify certain work he had done when he examined the recovered section (R. 173-175).

A written report was prepared by Lt. Cmdr. Alvey for his office, which reflected his conclusion that the recovered section was, in fact, part of the "One More" and, further, that the boat had suffered a fire, the cause of which was unknown, that it had then sunk, and that because of the absence of the persons on board, they must be considered dead (R. 180; 184).

No further trace of the boat or its occupants was ever found.

The action below was commenced by four of the Petitioners by means of a Libel and Complaint (R. 11). An Answer, including a Petition for Limitation of Liability, was filed by the respondent, who further instituted a Petition for Limitation of Liability by separate action (R. 22; 29). Claims were thereafter filed by the four original libellants. In addition, a claim was filed on behalf of the motherof another passenger (R. 46; 47; 49; 50; 51). The two proceedings were thereafter consolidated (R. 54).

Prior to trial of the matter, Letters of Administration were issued to the Petitioners based upon the published opinion of *In Re Bencel's Estate*, 78 N. J. Super. 545, 189 A. 2d 733 (App. Div. 1962).

Trial of the consolidated matters commenced before the Honorable Thomas F. Meaney, U. S. D. J., on December 10, 1963 (R. 67). On March 6, 1964, Findings of Fact and Conclusions of Law were filed, in which the court found as a matter of fact and as a matter of law that negligence had not been established (1a). The judgment of the District Court was appealed and was affirmed by the Court of Appeals for the Third Circuit on March 31, 1965 (10a; 12a).

ARGUMENT

I

The decision below is clearly correct.

Petitioners seek certification of certain questions which they allege are deserving of consideration by this court, concerning the operation of the doctrine of *res ipsa loquitur,* and the coverage of the doctrine of seaworthiness.

These questions were heretofore considered by the District Court and then on appeal by the United States Court of Appeals for the Third Circuit, both of which tribunals found adversely to the Petitioners.

The Petition is essentially a duplicate of Petitioners' Brief filed at the time of appeal. Essentially they pray that upon review of the trial transcript, this court will invoke the doctrine of *res ipsa loquitur* in their favor or, in the alternative, expand the doctrine of seaworthiness so as to include individuals falling within the category of sports fishermen, within which they claim they fall.

The present case is one that can be characterized as unusual or unique, but only in a very limited way. A boat is lost at sea and with it its owner and five passengers. The boat is sound, well equipped and its owner experienced and competent. The weather was good and the seas calm. How did this boat disappear? It is this question, rather than any question of law, that makes one become intrigued with this case and makes it unusual. There are, in addition, of course, natural and automatic considerations of sympathy as would follow from any loss of life. Our law, however, is not grounded nor does it operate upon these factors, but rather in a consistent manner granting, insofar as it can, equal justice to all.

The applicable law in this case has been recognized and applied in numerous cases of varying factual backgrounds many of which present equally intriguing questions of causation and parallel sympathetic features. In all of these cases the law sets a standard of proof to be met. Where it is, a remedy is available, and where it is not, the consequences must be borne as a part of life.

As can be seen from a review of the trial transcript, petitioners' theory of negligence was most tenuous. Basically, it was grounded upon the testimony of their expert Mr. Loeser, the gist of which was that the loss was apparently occasioned by an explosion of accumulated gasoline vapors in the bilge, followed by a fire of severe intensity (R. 250; 251; 256). Further, it was theorized that the vapor accumulation was caused by either (1) an erratic operation of the engines, or (2) operation of one engine with the other engine shut off (R. 257).

In the case of the first alternative, it was theorized that if both engines are operated erratically (which Petitioners apparently equate with slow speed or a speed slower than the crusing speed of the vessel), vapor accumulation results from the fact that "the gasoline from the carburetor to the intake manifold does not remain in suspension but begins to drop out into the intake manifold and that comes back through the air horn in the carburetor and spills over into the bilge" (R. 259).

As regards the second alternative, "when one engine is shut off and the other engine is operating and there is no way to stop the flow of gasoline to the carburetor of the dead engine, there is a pressure on that fuel which floods the carburetor of the dead engine and that spills over into the bilges" (R. 258).

Ignition of the fumes supposedly came about from either (1) a spark from the generator; (2) a spark from the distributor; or (3) the starter (R. 257; 395; 396).

Aside from the fact that these theories were disproven, as demonstrated by the testimony of Mr. Kell and Dr. Surosky in refutation thereof, they were grounded upon pure speculation (R. 316). Mr. Loeser implied this when during the course of cross-examination he admitted he didn't know the speed the boat was being operated at at the time of the occurrence, nor whether the motors were operating erratically, nor whether one motor was on and one motor was off, nor whether, for that matter, the boat was even in motion (R. 271; 279). At no time during the course of his examination did Mr. Loeser specifically state precisely what happened. The sum and substance of his testimony consisted of two theories as to gas vapor accumulation and a mere three sources of ignition from which innumerable possibilities can be postulated.

Lt. Cmdr. Alvey indicated he assumed the fire started in the engine compartment, the probable result of which was an explosion (R. 180; 181). He further indicated, however, the cause of the fire was unknown, that he did not know the proximate cause thereof, and that it was possible the boat suffered an explosion, which could have come about from any number of causes (R. 184; 195). In response to an hypothetical question posed during the course of his cross-examination and based upon the facts developed by examination and cross-examination of Petitioners' other witnesses as to the equipment on the "One More", and its operation and maintenance, he indicated that it was his expert opinion that the same constituted proper procedure (R. 185-196).

How the testimony of these two experts for the Petitioners cannot be said to be clearly grounded on speculation and in part be inconsistent is difficult to determine.

In *Schwecke* v. *U. S.*, 96 F. Supp. 225 (D. C. Cal. 1951), it was held that in a court of first instance, libellants must prove their case by establishing their probabilities, not possibilities. The mere choice of probabilities does not constitute evidence, but creates only conjecture and surmise on which a verdict of a jury cannot stand. *Franklin* v. *Shelly Oil Co.*, 141 F. 2d 568 (10th Cir. 1944); *Caputo* v. *U. S.*, 157 F. Supp. 568 (D. C. N. J. 1958); *Modla* v. *U. S.*, 151 F. Supp. 198 (D. C. N. J. 1957).

Additionally, as will be noted from a review of the trial transcript, respondents were obliged to present testimony in support of their defense as their motion for involuntary dismissal of petitioners' case was denied both at the end of the petitioners' case and at the end of the entire case (R. 291-294; 421; 424). This being the case, it is submitted that the effect of the doctrine of *res ipsa loquitur* was spent. An indication that the concept loses any special evidential effect it may have once a libellant has survived a motion for involuntary dismissal at the end of his case is found in *Geotechnical Corp. of Delaware* v. *Pure Oil Co.*, 196 F. 2d 199, *cert. den.*, 344 U. S. 874, 973 S. C. 165, 175 (1952), an explosion case brought in Admiralty. There the court stated at page 205:

> ". . . But the doctrine [res ipsa loquitur] as expounded by the Supreme Court, and to be applied in admiralty, has less potency than is given it in some other courts. . . . The effect of them is to hold that the doctrine is not a rule of law, but a principle of evidence, useful to aid in making a prima facie case, but that it does not change ultimately the burden of proof on the plaintiff to show negligence in the defendant; and when the evidence is all in, the question still is whether all the evidence, in the light of common experience, reasonably shows that the de-

> fendant was negligent in some respect that caused the injury, though the particular negligence cannot be pointed out or directly proved. (citations omitted)''

From the foregoing it would appear that where, as here, proofs were presented by both parties, any inference that may have initially benefited the Petitioner became one of a number of such inferences to be weighed by the court.

This court's pronouncement in the case of *Sweeney* v. *Irving*, 228 U. S. 233, 240; 33 S. Ct. 416 (1913), has been said to be the most quoted statement of the rule concerning the operation of the doctrine of *res ipsa loquitur*. There it is said:

> ''. . . *res ipsa loquitur* means that the facts of the occurrence warrant *the inference* of negligence, *not that they compel such an inference;* that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, *but it is evidence to be weighed, not necessarily to be accepted as sufficient;* that they call for explanation or rebuttal, *not necessarily that they require it;* that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.'' (Emphasis added)

Based upon this criterion, ample justification, therefore, existed to support the trial court's determination both as a matter of fact and as a matter of law that *res ipsa loquitur* did not apply.

Turning to the question of the application of the doctrine of unseaworthiness, it is clear that the law as it now exists does not encompass the petitioners' decedents. *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 629, 79 S. Ct. 406 (1959).

Further, there is a complete lack of proof that the decedents were in fact fishing at the time of the loss.

Lastly, it is incumbent upon the petitioners to prove the nature of the unseaworthy condition. In this respect the theories of negligence and unseaworthiness are similar. Again, this they did not do.

II

The questions presented relating to the doctrine of *res ipsa loquitur* are not proper for the purpose of certification as involving mixed questions of fact and law and the burden of proof.

Petitioners initially contend that while they do not essentially take issue with the finding of fact of the trial judge sitting in Admiralty without a jury, that based upon those facts the trial judge should have as a matter of law found in their favor utilizing the permissive inference that may be raised by application of the doctrine of *res ipsa loquitur* or, put in another manner, that their case was so well proven and the resulting inference so strong and pervading that it was essentially mandatory and could only result in the court's returning a verdict in their favor.

Whether or not petitioners *in fact* have accepted the findings of fact of the trial court can be seriously disputed. If they do, then their application to this court is clearly without merit on its face, for this representation indicates their acceptance with the court's findings numbered 8, 9,

10, 11, 18, 22, 24 and 25 (4a; 5a; 6a). These findings essentially indicate that a sound, well equipped seaworthy vessel operated by a competent, experienced owner was lost at sea and that to explain the cause of the loss several possibilities were given, but no general agreement was reached. As these findings obviously support the result, consideration of the Petition should end at this point.

In actuality, petitioners do not substantially accept the trial court's findings. A review of their Statement of Facts and Argument and a comparison of this with the trial court's findings reveal this. They seek to justify this and to justify their contentions on the purely emotional grounds that the sea erases evidence of disasters, and this court should balance the equities and place the burden of proof on the owner of the boat who must assume responsibility for any disasters which ordinarily do not happen in the absence of negligence. They state that the owner is in the best position to assume this obligation (Petitioners' brief, pp. 10, 11).

In essence their argument is one dealing with mixed questions of law and fact and with the weight of the evidence. Traditionally questions of this type have not been certified by this court. *Triplett* v. *Lowell*, 297 U. S. 638, 56 S. Ct. 645 (1935); *Pflueger* v. *Sherman*, 293 U. S. 55, 55 S. Ct. 10 (1934); *State National Bank of Springfield* v. *St. Louis Rail Fastening Co.*, 122 U. S. 21, 7 S. Ct. 1054 (1887).

Further, their argument apparently does not consider that respondent's decedent also was lost at sea and that respondent is, therefore, in no better position than the petitioners to explain this loss. As noted previously, petitioners received the benefit of the doctrine when respondent's motion for involuntary dismissal at the end of the

libellants' case was denied when thereafter the burden of coming forward with the evidence shifted to the respondent, who then produced testimony in support of their case. Having received this benefit they have no basis to now complain.

III

There is no conflict of decisions nor important question of federal law shown in the questions sought to be certified.

Petitioners' brief is devoid of any showing of any true conflict of decisions between the result obtained and the reported decisions of the Federal Courts at any level.

Petitioners have in the questions sought to be certified relied on the cases of *Leathem Smith-Putnam Navigation Co. v. Osby*, 79 F. 2d 280, *cert. den.*, 296 U. S. 653, 56 S. Ct. 370 (1935) and *The Rambler*, 290 F. 791 (2nd Cir. 1923) (Petitioners' brief, pp. 2, 3). Their analysis of the *Rambler* case is such that it clearly distinguishes this case on its face. The cause of the loss, *e.g.*, a boiler explosion, was clearly shown.

In the *Leathem Smith-Putnam* case, which petitioners merely cite without discussion, evidence as to the *cause* of the occurrence was far more readily apparent than in the case *sub judice*. The same holds true for the cases of *The Omar D. Conger*, 1 F. 2d 732 (E. D. Mich. 1924) and *The Columbia*, 25 F. 2d 516, *aff'd per curiam*, 25 F. 2d 518, cert. den., 277 U. S. 595, 48 S. Ct. 530 (1928), cited by the petitioners during the course of their brief (Petitioners' brief, p. 17).

A fairly recent case which bears what is submitted to be the most analagous factual situation is the case of *In Re Binstock,* 213 F. Supp. 909 (D. C. S. D. N. Y. 1963), a case where, incidentally, proctor for the petitioners represented a claimant in that Limitation action. In that case one Milton Binstock was the owner of a 30-foot Owens cabin cruiser which he had purchased in late 1956 or early 1957, and which was named the "Ina B II", which was equipped with twin inboard engines and was new when purchased.

In the late summer of 1958, Binstock commenced negotiations with one Samuel Glassberg for the purposes of selling him the vessel. In September of that year Binstock took Glassberg to Mantoloking, New Jersey, to inspect the vessel, and in October, 1958, Glassberg sought and obtained Binstock's permission to take the boat for a trial run.

On October 26, 1958, Binstock met with Glassberg and with one Murray Friedman, a business acquaintance of Binstock's, Lawrence Glassberg, a son of Samuel Glassberg, and with one Cyril Waldman, and the entire group then went to Mantoloking, New Jersey, where the boat was berthed, and a 45 minute demonstration was given apparently at the dock. The boat was not taken out at that time because of weather conditions. Thereafter the group headed north on the Garden State Parkway, and in view of the fact that it appeared that the weather was breaking, a call was made by Binstock or Glassberg to the Coast Guard and then the group returned to Mantoloking and boarded the boat for the trial run at sea. Lawrence Greenberg, however, did not board the boat, but took his father's car and went from Mantoloking to Manasquan to await the arrival of the boat.

The boat thereafter with the remaining individuals aboard, came from Mantoloking to Manasquan, at which

point Binstock left the boat and the three other men then went to sea for the purpose of traveling to the Bergen Beach Yacht Club in Brooklyn, New York. The boat never arrived.

A Coast Guard search was initiated, and on the day following the boat was located in a semi-sunken condition at a position approximately 3.7 miles from the Shark River Inlet. No one was aboard the boat. Thereafter, Binstock petitioned for Limitation of Liability pursuant to 46 U. S. C., §183, *et seq,* and decedents' representatives filed their claims. In addition, Friedman and Glassberg's representatives later asserted crossclaims against each other at pretrial more than two years after their death, each on the theory that the other was operating the boat and, thus, responsible for the death of the other.

At trial evidence was introduced showing that Glassberg and Friedman were both experienced boatmen, and that on the day in question wind conditions, which at midnight had been very strong, had by 4:00 P.M. diminished to a light breeze. Expert testimony was also presented as to the issue of the propriety of undertaking the voyage from Manasquan Inlet to Brooklyn under the weather conditions then obtaining.

A portion of the transom of the vessel was produced in court, specifically the lowest plank of the transom, which was in the stern of the vessel and which was broken in two sections. It had been removed from the vessel after the vessel had been recovered. Expert testimony was also given on behalf of the claimants to the effect that the split transom plank showed evidence of a crack, into which caulking material had been placed. On behalf of the petitioner Binstock, there was expert testimony to the effect that the crack in the transom plank was placed upon the vessel when it was lifted out of the water subsequent to

the casualty. There was also evidence that the cracked transom plank showed no signs of having been caulked, since there were no marks on the plank. In addition, a chemical analysis of the alleged caulk showed it to be paper.

There was also evidence that the Coast Guard Auxiliary had inspected the vessel and found it to be in a seaworthy condition before the voyage, and that it was equipped with adequate life preservers, a satisfactory bilge pump and a ship to shore radio.

The Court held that the weather conditions existing on the day in question were equally observable by all, and that the decision to undertake the voyage was that of the decedents. The court further indicated that even had the weather conditions been such as to dissuade a reasonably prudent yachtsman from undertaking the voyage, it could not find in favor of the claimants. Due to the fact that the Death on the High Seas Act applied in this instance, the court said that it was incumbent upon the claimants to show that the deaths involved were occasioned as the result of some breach of duty owed by the petitioner to the claimants' decedents. The court indicated that this showing had not been made, as the perils that may have existed were equally apparent to and cognizable by the claimants' decedents. The court states at page 915:

> "Even assuming that the dangers were such as to inhibit a reasonably prudent yachtsman from taking the INA B II out on that date, then it must be observed that the claimants' decedents were under no compulsion to take the trip at all. As was stated in Murphy v. Steeplechase Amusement Co., 250 N. Y. 479, 483, 166 N. E. 173, 174 (1929): 'The timorous may stay at home.' I agree with petition-

> er that in the case at bar Chief Judge Cardozo's observation is just as valid upon salt water as upon dry land."

The court also found that the petitioner had not been negligent in entrusting his vessel to the decedents or in failing to warn the decedents of the existing conditions as to weather. The court therefore granted the Limitation of Liability.

Insofar as the crossclaims by the two decedents against their respective estates were concerned, the court, after noting that these claims would be barred by the Statute of Limitations, indicated that even accepting the contention that the respective parties consented to a determination of their claims and waived the Statute of Limitations by virtue of the fact their attorneys signed the pretrial order that:

> ". . . I find that on the basis of the evidence adduced at the trial the claims must be dismissed for failure of proof. *It would be pure speculation to determine who was at the helm or who was navigating the Ina B II at the time it took on water; in like manner, it is impossible to determine what actually took place aboard the vessel, what proximately caused the tragedy, or which of the parties aboard was responsible therefor.*" (213 F. Supp. 909, 916; emphasis added.)

Turning to the question of the novel nature of the question relating to the doctrine of unseaworthiness, petitioners use this application in part as an attempt to seek the enlargement of the scope of the doctrine of unseaworthiness so as to include gratuitous passengers present on board a private boat for the purpose of engaging in the non-commercial venture of sport fishing and to make the owner, to an extent, an insurer.

Their justification for this is two-fold. First, they infer the magnitude of the loss cries for this extension, for without it, the loss is without a remedy, which is an offense to essential justice. Second, they suggest the appellants were, for all intents and purposes, seamen engaged in a maritime activity and, thus, encompassed by the scope of the concept.

As to their first point, there is no possible justification for the extension of the concept legally, morally, economically or sociologically, nor do the cases cited by the petitioners give any indication of the commencement of a trend that would ultimately lead to the expansion of the concept to the extent sought.

The doctrine of seaworthiness is a concept peculiar to admiralty requiring a ship owner to indemnify a seaman for injuries caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment. *Seas Shipping Co.* v. *Sierocki,* 328 U. S. 85, 66 S. Ct. 872 (1946). Historically, however, as pointed out in the *Seas Shipping Co.* case, the doctrine has encompassed seamen and, since 1946, longshoremen and harbor workers who perform jobs that traditionally in the past were those of seamen. There are cases where interesting distinctions have been drawn, and the doctrine has been held inapplicable. The one reported decision that research has disclosed that most parallels this case is *Kermarec* v. *Compagnie Generale Transatlantique, supra,* where the doctrine was declared not to apply to a guest visiting a seaman on a vessel.

The court's attention is invited to I. Edelman, "Maritime Injury and Death", p. 179 (1960), for other interesting examples where the doctrine was held not to encompass certain workers engaged in activities one would consider to be truly maritime in nature.

Rothman v. *U-Steer-It, Inc.*, 247 F. 2d 803 (5th Cir. 1957), cited by petitioners at page 22 of their brief, dealt not with the doctrine of seaworthiness, but with the validity of contractual terms purporting to limit liability.

In all the remaining cases cited by petitioners, a seaman was involved or one doing the work of a seaman. Proof was present which is not present here as to the actual activity the individual was engaged in at the time of the loss or injury complained of.

Petitioners' argument further assumes that if the doctrine applied, they would have recovered, which is a total misconception of the doctrine, as again the nature of the defect or condition giving rise to the unseaworthy condition must be shown.

As to petitioners' second proposition, they would infer that in actuality there was a consideration of sorts paid for their presence on board, that Joseph Bencel was a customer of Michael Simson and the other decedents were employees of Mr. Bencel, so that the relationship of the parties was colored by economic interests, and that Michael Simson had the men on board in payment or appreciation for business, past or future. Because they expressed the desire to fish for tuna, this is a maritime activity, and they are crewmen. This is most tenuous, to say the least, and it is believed that further discussion of this contention is unnecessary.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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